APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4101

E. B. WEISS,
Plaintiff-Appellee,

v.

R. C. LEHMAN and WAYNE LaRUE,
Defendants-Appellants.

Submitted Dec. 22, 1981

Decided May 12, 1982

Appeal from the United States District Court
For the District of Idaho

Before: VAN DUSEN, *, FARRIS and COOCHEVER, Circuit Judges.

FARRIS, Circuit Judge:

We consider this case for a second time on remand from the Supreme Court for reconsideration in light of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

The sole issue in our initial decision, 9 Cir., 642 F.2d 265 (1981), was whether a Bivens-type damage remedy had been properly implied against defendant Lehman, a Forest Service employee, to

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*Honorable Francis L. Van Dusen, Senior United States Circuit Judge, for the Third Circuit, sitting by designation.

remedy a violation of plaintiff Weiss' rights under the Fifth Amendment Due Process Clause.[1] In light of Parratt, we now consider the threshold issue, not raised in the first appeal, whether plaintiff Weiss' due process rights in fact were violated.

Weiss' claim arises out of the destruction of certain equipment and metal objects, consisting principally of three collapsed bus bodies, a metal box, eight empty barrels, and some refrigerators and stoves, which were left unattended on an unpatented mining claim on federal land for six years. Lehman disposed of the property as part of a clean up exercise. Weiss filed suit, however, asserting an ownership interest in the property, and claiming that its destruction was a violation of his Fifth Amendment due process rights. Weiss claimed that one of the mine claimants had traded the property to him in exchange for a lease on a dredge at another mining site. Weiss' ownership interest was not recorded, and Weiss did not claim that Lehman or any other Forest Service employee had actual knowledge of Weiss' interest. Nor did Weiss allege that Lehman acted with the intent to destroy property known or thought to belong to another person.

Parratt involved the negligent loss of a prison inmate's mail order hobby kit. Proceeding against various prison officials under 42 U.S.C. Sec. 1983, the prson inmate claimed that he had been deprived of his property without due process of law in violation of the Fourteenth Amendment. The Supreme Court found no due process violation.

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1. Finding neither "special factors counselling hesitation" nor an "equally effective alternative remedy," we affirmed.Our decision was vacated. ____U.S.____, 102 S.Ct.80, 70 L.Ed.2d 76 (1981)

Parratt states that

> either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process.

Id. at 539, 101 S.Ct. at 1915.

Here there was no need for quick action. Our task, then, is to decide whether meaningful predeprivation process was impractical and an adequate postdeprivation remedy was available. If so, Weiss did not suffer a deprivation of his property without due process of law.

(1) We find, however, that we cannot determine from the limited record before us whether meaningful predeprivation process was impractical. Weiss' allegations, and the evidence offered in their support, permit a conclusion that Lehman acted no worse than negligently with respect to Weiss' ownership interest. Weiss argues that the deprivation would not have occurred had Lehman followed proper Forest Service procedures for the destruction of personal property. See 36 C.F.R., Sec. 262.4, which provides for impoundment and disposition of personal property after notice to the owner, or if the name and address of the owner are unknown, then after specified public notice. Since removal of mere debris, such as an old, rusty car body thought to be abandoned and worthless, would not require compliance with 36 C.F.R. Sec. 262.4, the asserted failure to comply here, based on the evidence in the record, would appear to have been no more than a negligent oversight. If there was merely a negligent

departure from proper procedures, then such failure to follow procedures was no less "random and unauthorized" than the departure from procedure by the prison officials in Parratt. Under such circumstances, meaningful predeprivation process would be impractical for the same reasons that it was not practical for the prison officials in Parratt to provide a hearing prior to the tortious loss of the prison inmate's property. See id. at 541, 101 S. Ct. 1915.

(2, 3) As in Parratt, Weiss does not argue that the Forest Service procedures themselves are defective. The Forest Service is not and cannot be expected to publish notice before destroying abandoned and worthless property. Nor can the Forest Service reasonably be expected to provide notice before negligently departing from proper procedures by destroying property erroneously believed to be abandoned and worthless.

(4) The second requirement of Parratt is more clearly satisfied. Weiss had an adequate alternative remedy under the Federal Tort Claims Act, 28 U.S.C., Sections 1346(b), 2671-2680.

(5) Weiss' attempt to fit Lehman's conduct into the "discretionary function or duty" exception to liability, 28 U.S.C. Sec. 2680(a), fails. "The distinction generally made in the application of the discretionary function exemption is between those decisions which are made on a policy or planning level, as opposed to those made on an operational level." Thompson v. United States, 592 F. 2d 1104, 1111 (9th Cir. 1979). See Lindgren v. United States, 665 F. 2d 978, 980 (9th Cir. 1982) (quoting Thompson v. United States). Cf. Blessing v. United States, 447 F. Supp. 1160 (E. D. Pa. 1978). Here, Lehman's conduct was on the operational level rather than the planning level. See Hatahley v. United States, 351 U.S. 173, 76 S. Ct. 745,

100 L. Ed. 1065 (1956). In Hatahley, Navajo Indians sued under the Federal Tort Claims Act to recover for the wrongful destruction of their horses. The horses had been grazing on public lands of the United States when they were seized. Federal Agents failed to comply with notice requirements specified by the Federal Range Code before destroying the horses. The government's reliance on Section 2860(a) as a bar to liability was rejected. Id. at 181, 76 S. Ct. at 751.

The result in Parratt avoided trivalizing the Fourteenth Amendment.

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under Section 1983. Such reasoning "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." Paul v. Davis, 424 U. S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405.
>
> We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

Id. at 544, 101 S. Ct. at 1917. To permit the jury in this case to find a due process violation based solely on mere negligence would be inconsistent with the more limited role of the Due Process Clause contemplated by Parratt.

The judgment in favor of Weiss is vacated. On remand, Weiss should have the opportunity to pursue a due process claim by showing additional facts, such as intentional destruction of his property interest, that would make the Parratt limitation inapplicable.[2]

Vacated and Remanded for further proceedings consistent with this opinion.

BOOCHEVER, Circuit Judge, dissenting:

I do not share the majority's belief that our original decision in this case (642 F. 2d 265 (9th Cir. 1981) is incorrect in light of Parratt v. Taylor, 451 U. S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

I

BACKGROUND

Under Bivens v. Six Unknown Named Agents, 403 U. S. 388, 91 S. Ct. 1999, 29

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2. We do not decide now whether a due process violation could be predicated on acts greater than negligence but less than intentional conduct.

> The intent question cannot be given "a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a Sec. 1983 action." Baker v. McCollan, 443 U. S. 137, 139-140, 99 S. Ct. 2689, 2692-2693, 61 L. Ed. 2d 433 (1979). Rather, we must give close attention to the nature of the particular constitutional violation asserted in determining whether intent is a necessary element of such a violation.

Parratt, 451 U. S. at 547-48, 101 S. Ct. at 1919 (Powell, J., concurring).

L. Ed. 2d 619 (1971), as interpreted in Carlson v. Green, 446 U. S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) and Davis v. Passman, 442 U. S. 228, 245-48. 99 S. Ct. 2264, 2277-78, 60 L. Ed. 2d 846 (1979), a plaintiff injured by a federal employee's violation of the plaintiff's constitutional rights is entitled to recover money damages where there is neither a special factor counselling hesitation nor an equally effective alternative remedy. Bivens, 403 U. S. at 396-97, 91 S. Ct. at 2004-05. In our original decision, we affirmed the jury verdict and award of damages for Weiss because neither of the above limitations on a Bivens action were present.

We found no reason to "hesitate" in implying a damage remedy because Lehman "was adequately protected by the availability at trial of a qualified immunity defense." 642 F. 2d at 267. Indeed, the case was tried to the jury on the issue of whether Lehman was entitled to qualified immunity. There was sharply disputed evidence regarding the nature and value of the destroyed property.[1] Clearly implicit in the jury's verdict for Weiss, that was made after jury instructions to which no objection has been

[1] Weiss introduced evidence, including photographs and the testimony of several witnesses, showing that the property included valuable mining equipment and parts. The record also contains disputed evidence regarding whether Weiss failed to remove the property because the road to it was unusable or because the property was worthless.

raised on appeal,[2] are findings that the property had value and that Lehman's actions were not entitled to qualified immunity. In Butz v. Economou, 438 U.S. 478, 505-07, 98 S.Ct. 2894, 2910-11, 57 L.Ed.2d 895 (1978), the Court held that an official was protected by qualified immunity unless he knew or should have known that his conduct was unlawful. We were not "hesitant" in our original decision in implying a Bivens remedy because the qualified immunity defense meant that Lehman was not being held individually accountable for "mere mistakes in judgment." Id. at 507, 91 S.Ct. at 2911. Nevertheless, as discussed more fully below, the majority, in its attempt to bring this case within Parratt's scope, ignores the jury's fact-finding role and infers that the property was valueless debris that Lehman "acted no worse than negligently" in destroying. Majority slip op. at 2021, at ____.

We also held in our initial decision that the Tucker Act and the Fifth Amendment did not offer Weiss the short of equally effective alternative remedy that precludes brining a Bivens action. We noted that, in light of Carlson v. Green, Lehman had abandoned his claim that the Federal Tort Claims Act (FTCA), 28 U.S.C. Sections 1346(b), 2680, afforded an adequate alternative remedy. 642 F.2d at 266 n.2. I believe that Carlson rather than Parratt is the controlling precedent here, and that, even if Paratt were applicable, the majority errs in applying the standards set forth therein.

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2. The jury was instructed that Lehman was protected by qualified immunity if, inter alia, "there existed reasonable grounds for the belief that the action taken was appropriate" and Lehman "acted in good faith." The court explained that "good faith" meant that Lehman:

II

Carlson and Parratt

In Carlson, the plaintiff brought a Bivens action alleging that a federal prison official had violated her deceased son's constitutional rights by failing to provide proper medical attention. The Court discussed at length whether the plaintiff's available remedy under the FTCA precluded her from bringing a Bivens action. After reviewing the Congressional comments accompanying the 1974 amendments to the FTCA, the Court concluded that it was "crystal clear that Congress views FTCA and Bivens as parallel, complementary causes of action." 446 U.S. at 20, 100 S.Ct. at 1472. The Court went on to hold that, in the absence of an explicit expression from Congress to the contrary, a victim of wrongdoing by a federal official has an action against the Government under the FTCA as well as a Bivens action against the individual official.

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had an honest belief, after a reasonable investigation of the facts, that (his) action was a proper exercise of (his) authority; and that (he) acted without any motivation of malice, ill will, anger, revenge, personal animosity, or the like; and, further, that (his) action was not taken with a careless disregard of the rights of any person affected.

The jury was further instructed that it must find for Lehman: (a) unless he destroyed the property knowingly, voluntarily, and intentionally and not because of a reasonable mistake or accident; (b) if he "were merely abating or removing exposed or insanitary refuse or valueless debris;" or (c) he acted within the bounds of his lawful authority.

In contrast to Carlson and the present case, Parratt turned on whether the availability of a fully adequate state remedy precluded a plaintiff from bringing an action under 42 U.S.C. Section 1983 against a state prison official for the negligent loss of property. It was undisputed in Parratt that the state official was at worst negligent and that the plaintiff could have been fully compensated through his available state remedies. 451 U.S. at 537, 543-44, 101 S.Ct. at 1916-17.

The alternative-remedy issue in Parratt was not, as in Carlson and the present case, which of two federal remedies should have been pursued by a victim of a federal official's intentional tort, but, rather, whether negligent actions by state officials are actionable under Section 1983 (where no pre-deprivation notice is practical) if the state provides an adequate remedy. The focus in Parratt was on whether a federally actionable due process violation had occurred. The issues in Carlson and the present case are completely different. The availability of a FTCA remedy, as "a parallel, complementary" alternative to a Bivens action, Carlson, 446 U.S. at 20, 100 S.Ct. at 1472, does not make Lehman's conduct any less of a violation of Weiss's Fifth Amendment rights. The alternative state remedy was significant in Parratt because without it there would have been a federally actionable due process violation. In contrast, the question in this case turns on whether the availability of alternative remedies precluded a Bivens action. There is no question but that all the various post-deprivation procedures -- i.e., Bivens, FTCA, and Tucker Act actions -- satisfy due process.

One clear indication of how distinguishable Parratt is from the situation in Carlson and the present case is the fact that neither Bivens nor Carlson were even mentioned in Parratt. Five Justices filed concurring opinions in Parratt, in

which they emphasized, inter alia, the narrow scope of the Court's holding. The concurring Justices emphasize that Parratt turns on whether unintentional acts by state officials should be actionable in federal court under the Due Process Clause. See, e.g., 451 U.S. at 545-46, 547, 101 S.Ct. at 1917-18. For example, Justice Powell cautions that the Due Process Clause should not become a vehicle for federal litigation of state torts under Section 1983, "a statute that already has burst its historical bounds." Id. at 549 n. 7, 550-52, 554, 101 S.Ct. at 1920 n. 7, 1921, 1923. These concerns are inapposite to whether the availability of an alternative federal remedy precluded Weiss from bringing a Bivens action against Lehman.

III

The Parratt Test

Even if the Parratt test were applicable here, I would reach a different result from the majority in applying it. I believe that there was a practical means of affording pre-deprivation process and that no meaningful alternative to a Bivens remedy existed after the taking.

First, this is not the type of case where it was impractical to provide meaningful pre-deprivation process. In Parratt, the claim was made against supervisory prison officials to recover the value of materials lost due to the negligent failure of subordinates to follow normal procedures in handling mail. Because the officials had no way of knowing in advance that the subordinates would mishandle the mail, it was impossible to provide pre-deprivation process. In contrast, Lehman, in his capacity as the manager of the Forest Service Ranger Station that performed the clean-up operation, made a deliberate decision not to publish notice before destroying Weiss'

property. There was ample opportunity to give notice had Lehman correctly evaluated the status of the property. Although there was not the type of impracticality here as existed in Parratt, it still may be argued that, once the decision was made that the property was abandoned and valueless, it was impractical to publish notice. This is far from the type of "random and unauthorized" conduct that made notice impractical in Parratt. 451 U.S. at 541, 546, 101 S.Ct. at 1915, 1918. Here, Lehman, the supervising official, made a deliberate pre-deprivation decision, which the jury found to be unreasonably wrong, that the notice provisions should be dispensed with.

Second, I also question whether the FTCA is a "meaningful means" by which to assess the propriety of Lehman's action. Parratt, 451 U.S. at 539, 101 S.Ct. at 1915. In my opinion, the FTCA would be a "highly questionable" as opposed to a "meaningful" means because of the Act's discretionary function exemption. [3] The majority

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[3] Section 2680(a) of the Federal Tort Claims Act provides that liability should not be imposed on the basis of "the exercise or performance or the vailure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This discretionary function exception has presented interpretive problems from the time of its enactment. The principal difficulty is simply that all federal employees exercise a certain amount of discretion in the discharge of their duties. Courts have responded to the need to draw the elusive line between protected and unprotected activities by fashioning various tests such as the "planning-operational test," the "good Samaritan" test, and the balancing-

relies principally on the case of Hatahley v. United States, 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065 (1956) in contending that Lehman-s acts do not fall within the discretionary function exemption. In that case, however, it was undisputed that the Government officials knew the identity of the owners of the horses they destroyed, yet failed to give notice required by the appropriate federal regulations. The Court stated:

> We are here not concerned with any problem of a "discretionary function" under the Act, see Dalehite v. United States, (346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427). These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.

351 U.S. at 181, 76 S.Ct. at 752.

Had Weiss pursued this action under the FTCA, the Government would certainly have argued that Lehman's decision that notice was unnecessary because the property was abandoned and valueless constituted an act of discretion. Although not airtight, such an argument would have substantial merit. See Dalehite v. United States, 346 U.S. 15, 35-36, 73 S.Ct. 965, 967-968, 97 L.Ed. 1427 (1953); Martin v. United States, 546 F.2d 1355 (9th Cir. 1976), cert. den-

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of-policy-factors test. See generally Caban v. United States, 671 F.2d 1230 (2d Cir. 1982). Under any of these tests, I feel it is highly questionable whether Weiss would have an action against the Government under the FTCA.

ied, 432 U.S. 906, 97 S.Ct. 2950, 53 L.Ed.2d 1078 (1977); Youngstrom v. Dunn, 447 F.2d 948 (8th Cir. 1971) (per curiam); United States v. Delta Industries, Inc., 275 F.Supp. 934 (N.D. Ohio 1966). The FTCA provides that judgment in a tort claims action "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter against the employee of the Government whose act or omission gave rise to the claim". 28 U.S.C., Section 2676. Thus, by filing under the FTCA, Weiss would have taken a a substantial chance of losing because of the discretionary function exception and of being barred from bringing a subsequent action. Under these circumstances, so fragile a remedy as the FTCA is not a meaningful means to assess the propriety of Lehman's actions.

For all the reasons discussed, I would adhere to Judge Farris' original opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E. B. WEISS,

Plaintiff-Appellee,

vs.

R. C. LEHMAN and WAYNE LaRUE,

Defendants-Appellants.

No. 79-4101

ORDER

*

Before: VAN DUSEN, FARRIS, and BOOCHEVER, Circuit Judges.

Judges Van Dusen and Farris have voted to deny the petition for rehearing. Judge Boochever has voted to grant rehearing. Judge Van Dusen would add the following paragraph.

The petition for rehearing inaccurately states that the May 1982 opinion "begins with a statement of facts," whereas that opinion clearly states only that "Weiss' claim arises out of the destruction of certain equipment and metal objects . . ." (emphasis supplied). The opinion does not purport to determine the facts, but only remands to give Weiss "the opportunity to pursue a due process claim by showing additional facts." This is in accordance with the recent opinion of the Supreme Court of the United States in Pullman-Standard v. Swint, ___ U.S. ___ (Apr. 27, 1982, 50 U.S.L.W. 4425, 4430), where the Court said, inter alia, "a remand is the proper course

unless the record permits only one resolution of the factual issue."

The petition for rehearing is denied.

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* Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 79-4101
DC No. CV 75-36 RM
Idaho (Boise)

E. B. WEISS, Plaintiff-Appellee, vs. R. C. LEHMAN and WAYNE LaRUE, Defendants-Appellants.	)	ORDER

Before: VAN DUSEN*, FARRIS and BOOCHEVER, Circuit Judges.

This case was remanded by the Supreme Court for further consideration in light of Parratt v. Taylor, 49 U.S.L.W. 4509 (1981). Counsel are directed to file simultaneous supplemental memoranda addressing the issues in Parratt within twenty-one (21) days from the date of this Order.

BY ORDER OF THE COURT:

Christopher W. Vasil
Acting Clerk of Court
/s/ Cathy A. Catterson
By: Cathy A. Catterson
Deputy Clerk

* Honorable Francis L. Van Dusen, Senior United States Circuit Judge, Third Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4101

E. B. WEISS,
Plaintiff-Appellee,
v.

R. C. LEHMAN and WAYNE LARUE,
Defendants-Appellants.

Argued and Submitted Nov. 7, 1980

Decided Jan. 26, 1981

As Amended March 30, 1981

Appeal from the United States District Court
for the District of Idaho

Before: VAN DUSEN,* FARRIS and BOOCHEVER, Circuit Judges.

FARRIS, Circuit Judge:

The sole issue presented by this appeal is whether a *Bivens*-type damage remedy was properly implied against defendant Lehman, a Forest Service employee, under the Fifth Amendment due process and just compensation clauses.[1] We affirm.

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* Honorable Francis L. Van Dusen, Senior United States Circuit Judge, for the Third Circuit, sitting by designation.

[1] Jurisdiction in the trial court was first alleged under 28 U.S.C. § 1332 (1976) (diversity); that jurisdictional allegation was later amended to an allegation under 28 U.S.C. § 1331 (1976) (federal question). Jurisdiction on appeal is based on 28 U.S.C. § 1291 (1976).

I. FACTS

Lehman appeals an adverse judgment in a suit against him for damages for destruction of certain personal property located on an unpatented mining claim on federal land. The claim had been leased in 1967-68 to Continental Rare Metals, which contracted with Weiss to construct a dredge for a mining operation. When Continental's lease expired, it did not remove its equipment, which reverted to the mine claimants under the terms of the lease. Certain of the "scrap" metal and parts were later traded to Weiss by one of the mine claimants in exchange for a lease on a dredge at another mining site. Weiss's interest in the claim was unrecorded.

Lehman, as a U.S. Forest Service employee, drew up a plan to dispose of the property on the mining claim in 1973. Under Lehman's direction, Forest Service workers buried or removed most of the property on the claim and closed the access road.

Weiss's suit against Lehman was tried to a jury on the issue of whether Lehman was entitled to qualified immunity. The jury answered that question by awarding a verdict for Weiss in the sum of $1,000 damages plus costs.

Lehman argues on appeal that the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1976 & Supp. II 1978), in conjunction with the Fifth Amendment just compensation clause, provided an equally effective alternative remedy for Weiss.[2] *See Carlson v. Green*, 446 U.S. 14 (1980).

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[2] In light of *Carlson v. Green*, 446 U.S. 14 (1980), decided following submission of briefs in this case, Lehman has abandoned his contention that the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680 (1976), provides an equally effective alternative remedy.

II. ANALYSIS

The availability of implied causes of action for money damages against federal officers in their individual capacities for violation of constitutional rights was established in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (Fourth Amendment violation). The *Bivens* Court reasoned that when "no special factors counsell[ed] hesitation in the absence of affirmative action by Congress," *id.* at 396, and when "no explicit congressional declaration [required] that persons so injured . . . be remitted to another remedy, equally effective in view of Congress," *id* at 397, a plaintiff injured by a federal officer's violation of his constitutional rights was entitled to recover money damages. Although the Supreme Court had earlier reserved judgment on the applicability of *Bivens* to other constitutional violations by federal officers, *see Butz v. Economou*, 438 U.S. 478, 486 n.8 (1978), its two most recent decisions found neither special factors counselling hesitation nor equally effective alternative remedies. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (due process, equal protection, and Eighth Amendment violations); *Davis v. Passman*, 442 U.S. 228, 245-48 (1979) (Fifth Amendment due process violations).

A. *Special Factors Counseling Hesitation*

First, we must determine whether "special factors" counsel hesitation in implying a *Bivens*-type remedy. Specifically, we must assess whether Lehman occupies such an "independent status" in our constitutional scheme to render a judicially-created remedy against him inappropriate. *Carlson v. Green*, 446 U.S. 14, 19 (1980). Lehman, as a Forest Service employee, does not occupy a position of such constitutional stature that

implication of a damages remedy against him will significantly impair his ability to perform public functions, *see Butz v. Economou*, 438 U.S. 478, 507 (1978). *Cf. Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (federal marshals). *But cf. Bishop v. Tice*, 622 F.2d 349, 357 & n.16 (8th Cir. 1980) (availability of civil service remedies for wrongfully discharged federal employee was special factor counseling hesitation); *Bush v. Lucas*, 598 F.2d 958, 961 (5th Cir. 1979) (same), *vacated*, 446 U.S. 914 (1980) (in light of *Carlson*). He was adequately protected by the availability at trial of a qualified immunity defense. *See Butz*, 438 U.S. at 506-07.

B. *Equally Effective Alternative Remedy*

Second, we must determine whether relief under the Tucker Act-Fifth Amendment just compensation clause is both an alternative and "equally effective" remedy to a *Bivens*-type action.

The Tucker Act provides in relevant part that:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . .

28 U.S.C. § 1491 (1976 & Supp. II 1978). *See id.* § 1346 (a)(2) (district courts have concurrent jurisdiction when claim does not exceed $10,000). The Tucker Act is jurisdictional only; the source of a substantive right enforceable against the United States for money damages must be found elsewhere. *United States v. Testan*, 424 U.S. 392, 398 (1976). That substantive right is provided by the Fifth Amendment just compensation clause for one whose property is taken by the govern-

ment, *e.g.*, *United States v. Causby*, 328 U.S. 256, 267 (1946); *Jacobs v. United States*, 290 U.S. 13, 16 (1933), whether the property so taken is either real or, as here, personal, *e.g.*, *King v. United States*, 427 F.2d 767, 769, 192 Ct. Cl. 548 (1970). The Tucker Act and Fifth Amendment just compensation clause, then, do provide an alternative remedy.[3]

We must next determine whether the Tucker Act-Fifth Amendment remedy is equally effective to the *Bivens*-type remedy. *Under Carlson v. Green*, 446 U.S. 14, 18-19 (1980), the proper inquiry is whether Congress has provided an explicitly declared substitute remedy. Here, Congress has not declared the Tucker Act-Fifth Amendment remedy to be exclusive. *Cf. Carlson*, 446 U.S. at 19-20 (Congress explicitly declared F.T.C.A. to be an alternative to, rather than a substitute for, a *Bivens*-type remedy).

Additional factors support our determination that a *Bivens*-type remedy is appropriate. *See Carlson*, 446 U.S. at 20-23. The deterrence of unconstitutional acts by government officers is better served by the *Bivens*-type action, since damage recovery is against the federal officers individually, than by the Tucker Act-Fifth Amendment claim against the United States. *See id.* at 21. The *Bivens*-type action is also superior to the Fifth Amendment claim made under the Tucker Act because, as here, it provides for trial by jury. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 587 (1941) (Court of Claims' procedure may be restricted to nonjury trials when Congress consents to suit against the United States). *See also Carlson*, 446 U.S. at 22-23.

The Tucker Act-Fifth Amendment just compensation claim is less than equally effective to the *Bivens*-type

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[3] The appropriate court in which to bring such a claim would depend on the alleged value of the property taken. *See* 28 U.S.C. § 1346(a)(2) (1976 & Supp. II 1978).

remedy here. This conclusion comports with our prior decisions implying causes of action directly under the Fifth Amendment due process clause. *E.g., Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (First, Fifth, and Eighth Amendments); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1363-64 (9th Cir. 1978) (on denial of rehearing), *aff'd in part and rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). *Accord, Micklus v. Carlson*, 632 F.2d 227, 235-36 (3d Cir. 1980).

Affirmed.

JUDGMENT ON JURY VERDICT CIV 31 (7-63)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil Action File No. 3-75-36

E. B. WEISS

vs.

R. C. LEHMAN and WAYNE LARUE

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Ray McNichols, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, this 14th day of July, 1978,

It is Ordered and Adjudged That the Plaintiff, E. B. Weiss take nothing against the Defendant Wayne LaRue and it is

FURTHER ORDERED AND ADJUDGED That the Plaintiff, E. B. Weiss, receive Judgment assessed against the Defendant R. C. Lehman in the sum of One Thousand and no/100 Dollars ($1,000.00) actual damages together with Costs in the amount of $216.50.

Dated at Moscow, Idaho, this 15th day of July, 1978.

JERRY L. CLAPP
Clerk of Court

by /s/ Loa Jean Barden
LOA JEAN BARDEN
Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 3-75-36

E. B. WEISS,

Plaintiff

vs.

R. C. LEHMAN and WAYNE LaRUE,

Defendants.

VERDICT

We, the Jury, find in favor of:

1. The defendant, R. C. LEHMAN, and against the plaintiff

No

(Yes or No)

2. The defendant WAYNE LaRUE, and against the plaintiff

Yes

(Yes or No)

(If you answer BOTH 1 and 2 above "Yes", do not continue, but date and sign the form. If you answer either 1 or 2 above "No", answer question number 3 below.)

3. The plaintiff, E. B. WEISS, and against the (defendants [marked out]) (defendant), and assess the plaintiff's actual damages in the sum of $1,000.00.

(Mark through the word that does NOT apply.)

July 14, 1978
(Date)

/s/ Harold E. Harman
HAROLD E. HARMAN
(Foreman)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 3-75-36

E. B. WEISS,

Plaintiff,

v.

R. C. LEHMAN and WAYNE LARUE,

Defendants.

ORDER

This matter is before the Court on a motion of the defendants for summary judgment and on a cross-motion of the plaintiff for the Court to determine the issues of jurisdiction and the applicable statute of limitations.

The basis for the prayer for summary judgment is the contention that the defendants as employees of the United States acting in their official capacity in carrying out the alleged wrongful acts were absolutely immune from suit, or at least had a qualified immunity.

Defendants by answer have also challenged the jurisdiction of the Court and have alleged that the cause of action is time-barred by the applicable statute of limitations. Plaintiff in its cross-motion asks the Court to rule on these issues.

Briefs and documentary showings have been filed and examined. No oral argument is required.

Under the showing made to support the motion for summary judgment, I conclude that the defendants are not entitled to judgment as a matter of law on the immunity issue.

It appears that the Court has jurisdiction and that the applicable state of Idaho three-year statute of limitations had not run.

IT IS THEREFORE ORDERED:

1. That the motion of the defendants for entry of summary judgment is denied.

2. That the complaint states a claim upon which this Court can grant relief.

3. That the Court has subject matter jurisdiction.

4. That the claim of the plaintiff is not time-barred by the applicable statute of limitations.

Dated: October 5th, 1977.

/s/ Ray McNichols
RAY MCNICHOLS
Chief Judge
U.S. District Court
District of Idaho

FOREST SERVICE HANDBOOK
TITLE 2800 - MINERALS MANAGEMENT

Section 2811.5-3b

b. Unoccupied Buildings on Mining Claims. There are many structures scattered through the Forests which are objectionable as fire hazards and are also dangerous to the public. Such cabins or other structures that appear to have been abandoned on unpatented mining claims may not be destroyed without the owner's consent or until the mining claim on which they are situated has been declared invalid.

When the owner's consent cannot be obtained, the following procedure is necessary before a building on an unpatented mining claim is destroyed:

(1) Gather preliminary data.

(a) Ascertain name of mining claim and last owner of record.

(b) If last owner is deceased, digest the following data: Probate, if any; known heirs and addresses.

(c) If person is believed to be living, through inquiry, try to obtain the last known address.

(d) Ascertain any evidence of assessment work that may have been recorded in county records and when any such work was last recorded.

(3) Evidence of any recent mining activity, location notices, etc.

(2) Request a mineral examination after all the preliminary data available on the case have been gathered.

(3) Initiate protest action under the General Mining Laws. When the owners of record cannot be located or are deceased, service by publication will be necessary. (FSH 2811.1, section 221.60)

After a mining claim has been declared null and void and the appeal time has expired, the Forest Service Supervisor may then take appropriate action for the removal of any structures.

TITLE 5300 - TRESPASS

5335.01b - Secretary's Regulation T-15 - Impounding of Personal Property.

(a) Automobiles or other vehicles, trailers, boats, camping equipment, and other inanimate personal property on National Forests or other land or waters under Forest Service control without the authorization of a Forest officer which are not removed therefrom within the prescribed period after a warning notice as provided in this regulation may be impounded by a Forest officer. Whenever such Forest officer knows the name and address of the owner, such impoundment may be effected at any time five days after the date that written notice of the trespass is mailed by registered mail or delivered to such owner, unless in the meantime the trespass has ceased.

(b) In the event the local Forest officer does not know the name and address of the owner, impoundment may be effected at any time 15 days after the date a notice of intention to impound the property in trespass is first published in a local newspaper and posted at the county courthouse and in one or more local post offices. A copy of this notice shall also be posted in at least one place on the property or in proximity thereto.

(36 CFR 261.16, promulgated Feb. 26, 1963 (28 F.R. 1769).

(c) Personal property of the kind specified in paragraph (a) of this section belonging to an owner whose identical property has been previously found in trespass during the calendar year, which subsequent to notice and action under (a) or (b) of this section, is found in continuing or subsequent trespass, within 12 months after the original notice of intention to impound such property is mailed or delivered to the owner or first published in the calendar year in a local newspaper and posted at the county courthouse and in one or more local post offices, may be impounded without further notice.

(d) Personal property impounded under this regulation may be disposed of at the expiration of 90 days after the date of impoundment. The owner may redeem the personal property within the 90-day period by submitting proof of ownership and paying all expenses incurred by the United States in advertising, gathering, moving, impounding, storing and otherwise caring for the property, and also for the value of the use of the site occupied during the period of the trespass.

(e) If the personal property is not redeemed on or before the date fixed for its disposition, it shall be sold by the Forest Service at public sale to the highest bidder. If no bid is received, the property, or portions thereof, may, in the discretion of the responsible Forest officer, be sold at private sale or be condemned and destroyed or otherwise disposed of. When personal property is sold, pursuant to this regulation, the Forest officer making the sale shall furnish the purchaser a bill of sale or other written instrument of evidence of the sale.